IN THE

Supreme Court of the United States

October Term, 1954

No. 90

MARTIN E. WOLIN, Individually, MARTIN E. WOLIN, LTD., and CHAL STEEL CORPORATION, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

I

In its opposition to certiorari the Government does not contest our position that a prosecutor outsteps all decent bounds when he introduces testimony which he believes to be false. The sole question, therefore, is whether the prosecutor actually believed Twila Bennett's testimony that she had nothing but the most casual participation in the alleged bribery and no guilty knowledge of the purpose of the transaction.

It is clear from the Government's argument (pp. 13-14, Brief in Opposition) that the prosecutor did not believe at the time of the trial Twila Bennett was telling the truth nor does he believe it today. In some detail the Government points out the circumstantial evidence which justifies its belief that she is guilty and that she had much more

to do with the transaction than appears in her testimony. The conclusion is, therefore, inescapable that the Government knew she was lying when she disclaimed any guilty participation in or any guilty knowledge of the alleged crime. How then can the Government justify putting such testimony in evidence and commenting on it as follows:

> "You know who she's going to be sentenced by, in front of you, don't you, the good Judge that is sitting on the bench right now. Do you suppose she would want to lie on the stand in front of him? What kind of reasoning is that? It is all the more reason she should tell the truth." (R. 116)

It was a crucial part of the Government's case to contradict Wolin's story that the transactions were between Twila Bennett and Wolin. The prosecutor did so by Twila's testimony that she had only a casual connection with the transactions and no guilty knowledge of its purpose. This is the testimony the prosecutor vouched for in the above statement.

And now the Government appears before this Court saying that the circumstantial evidence against Twila Bennett was so strong as to make the Government believe then and now that she was guilty of bribery and conspiracy to bribe and that her testimony that she had no guilty part in the transactions was false.

We submit the conviction should not be obtained in that way even if the evidence had been so clear that in an ordinary case it would have been non-prejudicial error. But the Solicitor General does not even argue that the error was non-prejudicial. He could scarcely do so since the jury hung and the *Allen* instruction was read to it twice. The Solicitor General takes the bold position that it was a proper practice for the prosecutor to vouch for the testimony of Twila Bennett which he now concedes is unworthy of credibility because of the circumstantial evidence against her. And the Court of Appeals by its opinion below has sanctioned such a practice.

II

Equally damaging to every theory of orderly and fair practice is the failure of the Court of Appeals to consider as error the misrepresentation made in the closing argument of the prosecutor as to the testimony of Henry Bennett. Henry Bennett's testimony was as inconsistent with his guilty plea as was Twila Bennett's. It completely corroborated petitioner's statement that the payments were for commissions not for licenses. The prosecutor must have been keenly aware of this corroboration. It was the principal stumbling block in the way of a conviction. He escaped his dilemma by a vivid misstatement and strenuously objected to any correction of that misstatement when the transcript was called to his attention.

In attempting to defend that error in this case counsel for the Government (who were not present at the trial) copied into their brief on appeal the prosecutor's version of an alleged argument made by counsel for the defense which was not reported. This version appeared in their brief as if it were part of the record. The court below based its decision sustaining the Government solely on the ground that such an argument had been made and refused to correct its opinion after it was called to its attention that the record did not support the opinion.

The Solicitor General now for the first time discloses where the Government found its version of the unreported argument upon which it so heavily relies. It is taken from the prosecution's argument opposing a motion for a new trial. The Solicitor General thinks its truth is corroborated by the fact that it is taken word for word, not from the record, but from the prosecutor's statement. Counsel's protest that he never made such an argument and that it would have been foolish to make it is brushed aside on the ground that it is "at least plausible that petitioner's counsel might have talked" about this trivial issue. (Br. 17)

Of course an appellate court cannot decide what defense counsel said in the absence of a transcript or other evi-

dence. But that is precisely what the court below did in its opinion. And so we have the misrepresentation of the evidence by trial counsel compounded by a misrepresentation of the record on appeal in order to justify the trial misrepresentation.

In all candor, if this procedure is sanctioned, what protection has counsel for the defense against the bare assertion of the Government as to matters outside the record? This procedure is such a substantial departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We believe that the opposition brief of the Government which attempts to sanction the practices indulged in in this case establishes by that very fact a case where this Court should grant certiorari.

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